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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-739

UNITED STATES OF AMERICA, *Petitioner*

v.

THE STATE OF CALIFORNIA, *et al.*

On a Petition for Writ of Certiorari to the United States Temporary Emergency Court of Appeals

BRIEF FOR THE STATE OF CALIFORNIA IN OPPOSITION

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
ARGUMENT IN OPPOSITION TO THE PETITION	5
I. SECTION 218 OF THE ACT HAS BEEN CONSTRUED BY THE TEMPORARY EMERGENCY COURT OF APPEALS IN A MANNER CONSISTENT WITH OVER THIRTY YEARS OF CLEAR JUDICIAL PRECEDENT	6
II. PETITIONER UNITED STATES HAS UNEQUIVOCALLY CONCEDED THAT CALIFORNIA HAS NOT COMMITTED A PRE-EXPIRATION VIOLATION, BY "ESCROW" OR OTHERWISE	9
III. IT IS UNCONTROVERTED THAT THE GENERAL SAVING STATUTE (1 U.S.C. § 109), LIKE SECTION 218 OF THE ACT, PERMITS THE INSTITUTION OF CIVIL OR CRIMINAL ENFORCEMENT PROCEEDINGS AFTER EXPIRATION *ONLY* WHERE SUCH PROCEEDINGS ARE PREDICATED ON VIOLATIONS OF THE ACT COMMITTED WHILE THE ACT WAS STILL IN EFFECT	11
IV. SECTION 218 OF THE ACT, AS PROPERLY CONSTRUED BY THE TEMPORARY EMERGENCY COURT OF APPEALS, REFLECTS A CLEAR INTENT BY CONGRESS TO RETURN TO A FREE MARKET	13
CONCLUSION	15

TABLE OF AUTHORITIES CITED

CASES

Page

Allen v. Grand Central Aircraft Co., 347 U.S. 535 (1953) 7, 8, 9, 12
Bowen v. United States, 171 F.2d 533 (5th Cir. 1949) 13
Bryne v. United States, 218 F.2d 327 (1st Cir. 1955) 9
Chippewa County Co-Op Dairy v. Clark, 163 F.2d 753 (Em. App. 1947) 7, 8
Coan v. *State of California*, 11 Cal.3d 286, 520 P.2d 1003 (1974) 11
Creedon v. Stratton, 74 F.Supp. 1970 (Nev. 1947) 8
De La Roma S.S. Co. v. United States, 344 U.S. 386 (1952) 9
Eastern Coal Corp. v. N.L.R.B., 176 F.2d 131 (4th Cir. 1949) 12
Fasons Realty Corp. v. Bowles, 146 F.2d 499 (Em.App. 1944) 7
Faubion v. United States, 424 F.2d 437 (10th Cir. 1970) 13
Haldeman Creamery, Inc. v. Kendall, 208 F.2d 360 (Em.App. 1953) 9
Herman v. Woods, 175 F.2d 781 (Em.App. 1949) 12, 13
Hertz v. Woodman, 218 U.S. 205 (1910) 13
J. J. Schmitt v. Turney, 169 F.2d 425 (Em.App. 1948) 7
Jonco Aircraft Corp. v. Franklin, 346 U.S. 868 (1953) 9
Maceri v. United States, 342 F.Supp. 505 (E.D. Mich. 1972) 13
Markbreiter v. Woods, 163 F.2d 993 (Em.App. 1947) 7
Maryland v. Wirtz, 392 U.S. 183 (1967) 15
N.L.R.B. v. Edw. G. Budd Mfg. Co., 169 F.2d 571 (6th Cir. 1948) 12
N.L.R.B. v. National Garment Co., 166 F.2d 233 (8th Cir. 1948) 12
Peters v. Felber, 66 Cal.App.2d Supp. 1011 (1944) 13
Professional & Business Men's Life Ins. Co. v. Bankers Life, 163 F.Supp. 274 (Mont. 1958) 13
Quirk v. U.S., 161 F.2d 138 (8th Cir. 1947) 8
Standard Kosher Poultry v. Clark, 163 F.2d 430 (Em. App. 1947) 7
Stanolind Oil & Gas Co. v. Freehill, 205 F.2d 305 (Em.App. 1953) 7
State of California v. United States, T.E.C.A. No. 9-19 (pending) 4
Stillman v. U.S., 177 F.2d 607 (9th Cir. 1949) 8
Sullivan v. Day, 372 F.Supp. 359 (E.D. Ky. 1974) 13
Talbot v. Woods, 164 F.2d 493 (Em.App. 1947) 7
United States v. Carter, 171 F.2d 530 (5th Cir. 1948) 13
United States v. International Brotherhood of Electrical Workers, 475 F.2d 1204 (1973) 10, 11

TABLE OF AUTHORITIES CITED—Continued

CASES—Continued

Page

United States v. Smalldone, 485 F.2d 1333 (10th Cir. 1973) 13

United States v. State of California, 504 F.2d 750 (T.E.C.A. 1974) ..... *passim*

Warden, Lewisburg Penitentiary v. Marrero, 414 U.S. 1128 (1974) 13

Waseca Realty Corp. v. Porter, 156 F.2d 67 (Em.App. 1946) .. 7

UNITED STATES CODES

1 U.S.C. § 109 ..... 3, 11, 12, 13

12 U.S.C.A. § 1904 2

18 U.S.C. § 4204 13

26 U.S.C. § 7237(d) 13

UNITED STATES EXECUTIVE ORDERS

Executive Order No. 11781 13

Executive Order No. 11788 14

UNITED STATES STATUTES

Defense Production Act of 1950 6

Economic Stabilization Act of 1970

Section 211(g) 2

Section 218 ..... *passim*

Emergency Price Control Act of 1942 ..... 6, 8

Pub. L. No. 91-379 2

No. 92-10 2

No. 93-28 2

No. 93-387 14

War Revenue Act 13

War Risk Insurance Act 9

UNITED STATES REGULATIONS

"Phase III" Regulations (6 C.F.R.) 11

CALIFORNIA STATUTES

Stats. 1973, Chap. 1136 10

Stats. 1974, Chap. 597 (Assembly Bill 4428) 4

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On a Petition for Writ of Certiorari to the United States Temporary Emergency Court of Appeals

BRIEF FOR THE STATE OF CALIFORNIA IN OPPOSITION

The State of California, et al., respectfully opposes the Petition for Writ of Certiorari, filed herein on December 12, 1974, to review the judgment of the Temporary Emergency Court of Appeals.

OPINION BELOW

The judgment and opinion of the Temporary Emergency Court of Appeals, dated September 19, 1974, is reported at 504 F.2d 750.

On November 12, 1974, the Temporary Emergency Court of Appeals denied the government's Petition for Rehearing and Suggestion for Rehearing *En*

Banc,[1] but on November 18, 1974, granted the government's Motion to Stay Mandate pending a timely filing of the Petition for Writ of Certiorari herein.

JURISDICTION

Jurisdiction is invoked by petitioners pursuant to section 211(g) of the Economic Stabilization Act of 1970 ("Act"), as amended.[2]

QUESTION PRESENTED

Petitioner United States has admitted in its Complaint on file herein that "at *all* times" respondent State of California has complied with the August 1973 Decision and Order of the Cost of Living Council "and have not paid out any salaries or wages in excess of said Decision and Order". See 504 F.2d at 755. The Economic Stabilization Act expired on April 30, 1974, pursuant to section 218 of the Act. The only issue, therefore, is whether the Council may enforce its Decision and Order as to proposed State pay practices which do *not* involve federal laws, orders, or reg-

[1] Eight of the nine members of the Court denied the Suggestion for Rehearing *En Banc*. Circuit Judge James M. Carter, the only member of the Court who would have granted the Suggestion for Rehearing *En Banc*, joined Judges Estes and Christensen, the panel who decided this case, in the Order denying the Petition for Rehearing. Accordingly, the questions raised in the instant Petition for Writ of Certiorari have been brought to the attention of the entire panel of the Temporary Emergency Court of Appeals and have been unanimously rejected.

[2] Pub. L. 91-379, 84 Stats. 797; Pub. L. 92-10, 85 Stats. 743; Pub. L. 93-28, 87 Stats. 28. The text of the Act is contained in the Note to 12 U.S.C.A. § 1904 (1973 Poc.Pt.).

ulations violated during the period of economic controls. Stated another way:

DOES SECTION 218 OF THE ECONOMIC STABILIZATION ACT PERMIT CONTINUING JURISDICTION OF THE COST OF LIVING COUNCIL OVER POST-EXPIRATION PAY PRACTICES IN THE ADMITTED ABSENCE OF PAST VIOLATIONS COMMITTED WHILE THE ACT AND REGULATIONS THEREUNDER WERE STILL IN EFFECT?

STATUTES INVOLVED

The principal statutory provision upon which the decision of the lower court was predicated is section 218 of the Act, which provides as follows:

> "The authority to issue and enforce orders and regulations under this title expires at midnight April 30, 1974, but such expiration shall not affect any action or pending proceeding, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to May 1, 1974."

The General Saving Statute, 1 U.S.C. § 109, also provides in pertinent part:

> "... The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution

for the enforcement of such penalty, forfeiture, or liability."

STATEMENT OF THE CASE

The opinion of the lower court (504 F.2d 750) accurately articulates the posture of the instant case. However, the lower court's recent consideration and disposition of a related case, *State of California* v. *United States,* Temporary Emergency Court of Appeals No. 9–19, and petitioner's misleading characterization of that matter, must be mentioned. There, on October 3, 1974, Judge Thomas J. MacBride of the United States District Court for the Eastern District of California denied for lack of subject matter jurisdiction the government's Motion for Leave to File an Amended Counterclaim which sought an injunction against a California statute (Stats. 1974, Chap. 597), effective August 30, 1974, providing for a *prospective*[3] wage and salary increase for state employees for the month of September 1974. An appeal was taken

[3] The statute expressly excluded *retroactive* payment as follows: "The Legislature further declares that a similar adjustment for employees who retired or left state service during that period [July 1, 1973 to April 30, 1974] is merited and that it is the intent of the Legislature to make provision for for such an adjustment when and if such action is legally possible." (Brackets added.)

The legislation further provided:

"This act provides funds for an increase in salaries for services during the month of September 1974 and is not a retroactive payment for services rendered between July 1, 1973 and June 30, 1974."

The State of California therefore takes exception to petitioner's characterization of the statute as a "lump sum retroactive payment of the escrowed funds." (Petition, pp. 5-6, fn. 2.)

to the Temporary Emergency Court of Appeals on October 15, 1974; the petitioner's Motions for Injunction Pending Appeal and for Stay of Proceedings were granted, but following the Court's decision of November 12, 1974 in the instant case, the Court ordered the matter to proceed. A Suggestion for Hearing *En Banc* was denied on November 27, 1974, after a polling of each of the nine members of the Court. Following the filing of briefs, the matter was placed on the Court's summary calendar on December 18, 1974.

On December 23, 1974, the Court granted the Motions of appellee State of California and intervenor California State Employees' Association To Suspend and Vacate the Injunction Pending Appeal, and affirmed the judgment of dismissal by the District Court. On that same day, however, at the petitioner's instance, the Court stayed its decision "pending timely consideration by the United States Supreme Court of the Petition for Certiorari in TECA cases 9–13 and 9–14."

ARGUMENT IN OPPOSITION TO THE PETITION

Introduction

Without the benefit of a single case in its support, petitioner seeks a reconsideration by this Court of arguments which have received the attention of the entire nine-member panel of the Temporary Emergency Court of Appeals (see Footnote 1, *supra*). In denying rehearing and rehearing *en banc,* the Court

was presented with the precise legal and factual[4] arguments which make up the Petition for Writ of Certiorari herein.

I. Section 218 of the Act Has Been Construed by the Temporary Emergency Court of Appeals in a Manner Consistent With Over Thirty Years of Clear Judicial Precedent

In the United States District Court for the Eastern District of California, and indeed before the original panel of the Temporary Emergency Court of Appeals, petitioner United States urged:

> "There is nothing in the [Economic Stabilization] Act which indicates that Congress did not intend a comparable result with respect to preserving jurisdictional provisions in appropriate cases as was reached under the Emergency Price Control Act of 1942 and the Defense Production Act of 1950."[5] (Brackets added.)

Having relied on the statutory construction accorded similar language of prior control acts[6], and having received an adverse determination of such contention,

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[4] For example, in its Petition for Rehearing and Suggestion for Rehearing *En Banc* which was presented to the entire nine members of the court below, petitioner appended to its pleadings a twelve-page affidavit of former Director of the Cost of Living Council, Dr. John T. Dunlop, which expressed in some detail the government's fears of the "unraveling" and "inflationary" impact of the decision here appealed from.

[5] This statement appears at page 74 of the Record on Appeal (Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, page 12) and from Appellee's (petitioner's) Brief below, pages 26–27.

[6] At page 27 of Appellee's Brief, it was also alleged: "The Defense Production Act of 1950 contained language similar to that in section 218 of the Economic Stabilization Act."

petitioner in both its Petition for Rehearing and Suggestion for Rehearing *En Banc* below[7], and in the within Petition for Writ of Certiorari, now argues that section 218 of the Act should be read in a vacuum.

Suffice it to say that the Opinion below is supported not only by the prior decisions of this Honorable Court[8] and of former Emergency Courts of Appeal[9], but by numerous other cases involving the same or similar expiration (and saving) clauses of federal statutes. All such cases uniformly hold that the continuing jurisdiction of the federal agency in question must be predicated on violations of the federal statute (or regulations issued pursuant thereto) which were committed while the statute or regulations were still in effect. For decisions of other Emergency Courts of Appeal which have similarly refused to entertain post-expiration complaints, either for lack of subject matter jurisdiction or mootness, *see J. J. Schmitt* v. *Turney,* 169 F.2d 425 (Em.App. 1948); *Markbreiter* v. *Woods,* 163 F.2d 993 (Em.App. 1947); *Waseca Realty Corp.* v. *Porter,* 157 F.2d 67 (Em.App. 1946); *Fasons Realty Corp.* v. *Bowles,* 146 F.2d 499 (Em.App. 1944); *Chippewa County Co-Op Dairy* v. *Clark,* 163

[7] In its Petition for Rehearing (p. 5) below, petitioner for the first time argued: "It is submitted that section 218 should *not* be interpreted by reference to prior control acts." (Emphasis added.) The State of California was understandably shocked and dismayed at this inexplicable shift in petitioner's argument.

[8] *Allen* v. *Grand Central Aircraft Co.,* 347 U.S. 535, 74 S.Ct. 745, 98 L.Ed. 933 (1953).

[9] *Talbot* v. *Woods,* 164 F.2d 493 (Em.App. 1947); *Standard Kosher Poultry* v. *Clark,* 163 F.2d 430 (Em.App. 1947); *Stanolind Oil and Gas Co.* v. *Freehill,* 205 F.2d 305 (Em. App. 1953).

F.2d 753 (Em.App. 1947); *Creedon* v. *Stratton*, 74 F. Supp. 170, 180 (Neb. 1947) [10].

Petitioner has abandoned virtually *all* of the cases upon which reliance was placed in the Temporary Emergency Court of Appeals, and for good reason.[11] To petitioner's misfortune, its cases left little doubt (if any was present) that section 218 precluded continuing jurisdiction of the Cost of Living Council after April 30, 1974. This Court's decision in *Allen* v. *Grand Central Aircraft Co., supra,* 347 U.S. 535 (1953), relied on by petitioner, not only involved pre-expiration violations, but held that the specific or general "saving clause" permitted post-expiration suits only "to enforce the expired statute in relation to violations of it, or of regulations issued under it,

[10] The *Creedon* case is somewhat extreme in that there the District Court refused to award injunctive relief even as to *pre-expiration* violations. The State of California freely concedes that its *pre-expiration* violations would be subject to civil or criminal enforcement proceedings. Such proceedings would be inappropriate, however, and none have been instituted, because of California's close (and good faith) compliance with federal law. Such is admitted by petitioner United States, who has stated that "at *all* times" California complied with all federal law and orders prior to the April 30, 1974 expiration of the Economic Stabilization Act of 1970. See 504 F.2d at 755.

For criminal cases discussing jurisdiction over past violations of the Emergency Price Control Act of 1942, or conspiracy to commit such violations, see *Stillman* v. *United States,* 177 F.2d 607 (9th Cir. 1949) and *Quirk* v. *United States,* 161 F.2d 138 (8th Cir. 1947). Here, of course, neither a violation, or conspiracy to violate, federal law or orders was alleged (or even suggested) by petitioner United States before the District Court.

[11] The Temporary Emergency Court of Appeals held: ". . . the Government is able to cite *no cases* which would permit it to bring this suit after the expiration date of the Act. . . ." (Emphasis added.) 504 F.2d at 754.

occurring before its expiration." (Emphasis added.) 347 U.S. at 554–555. Petitioner's other cases were of similar effect: *Jonco Aircraft Corp.* v. *Franklin,* 346 U.S. 868 (1953) involved *pre-expiration* violations; *Haldeman Creamery Inc.* v. *Kendall,* 208 F.2d 360 (Em.App. 1953) held that "enforcement suits" could be brought for *pre-expiration* violations; *Bryne* v. *United States,* 218 F.2d 327 (1st Cir. 1955) concerned a *pre-expiration* enforcement suit; and in *De La Roma S.S. Co.* v. *United States,* 344 U.S. 386 (1952), the "act" upon which jurisdiction rested was the loss of a ship which occurred *prior to expiration* of the War Risk Insurance Act. Thus, *all* of the cases asserted by petitioner either did not reach the precise issue here or in fact expressly dictated that the acts of the State of California which occur subsequent to the expiration of economic controls are not subject to federal jurisdiction. Continuing jurisdiction is applicable only to pending civil or criminal *enforcement* proceedings, or to *violations* occurring prior to May 1, 1974. Here, there is neither a pending enforcement proceeding nor, as admitted by petitioner, a pre-expiration violation of the Economic Stabilization Act of 1970 by the State of California.

II. Petitioner United States Has Unequivocally Conceded That California Has Not Committed a Pre-expiration Violation, by "Escrow" or Otherwise

At oral argument in the lower court, the court (not petitioner United States) raised a question as to whether California may have created an "escrow" ac-

count for its salary purposes as disapproved by the Temporary Emergency Court of Appeals in *United States* v. *International Brotherhood of Electrical Workers,* 475 F.2d 1204 (T.E.C.A. 1973). Seizing on the suggestion, petitioner United States suddenly retreated from its earlier admission that California had *not* committed a pre-expiration violation [12] and filed with the Temporary Emergency Court of Appeals an extensive 21-page letter memorandum alleging that California had, over one year ago, improperly placed such funds in an illegal "escrow". The oppositions to such contention by the State and the California State Employees' Association, intervenor, are a matter of record and, of course, the Temporary Emergency Court of Appeals has agreed that no such violation occurred.

By the subject statute (Stats. 1973, Chapter 1136), effective *October 2, 1973,* unexpended sums in the 1973 Budget were merely transferred to the Salary Increase Fund "until appropriated by the Legislature." There was no intent to pay said sums upon the expiration of economic controls and, in fact, the State did not do so even though as of May 1, 1974, the date of expiration of the Economic Stabilization Act of 1970, there existed no outstanding federal injunction

[12] Petitioners in the District Court alleged that California "at all times" complied with the August 1973 Decision and Order of the Cost of Living Council "and have not paid out any salaries or wages in excess of said Decision and Order." 504 F.2d at 755.

or other order prohibiting payment.[13] Furthermore, petitioner United States, who fully participated as *amicus curiae* in *Coan* v. *State of California,* 11 Cal. 3d 286, 520 P.2d 1003 (1974) and argued extensively on *October 17, 1973,* was well aware of what it *now* alleges, over a *year later,* to be an illegal "escrow".

Even if the questioned reappropriation were deemed an "escrow", California acting under voluntary "Phase III" regulations violated no agency regulation or order. The lower court's rationale on this issue is sound, particularly in view of the fact that the same three members of the Temporary Emergency Court of Appeals who decided the *International Brotherhood* case found its inapplicability to the case at bar.

III. It Is Uncontroverted That the General Saving Statute (1 U.S.C. § 109), Like Section 218 of the Act, Permits the Institution of Civil or Criminal Enforcement Proceedings After Expiration Only Where Such Proceedings Are Predicated on Violations of the Act Committed While the Act Was Still in Effect

[13] In fact, as of May 1, 1974, the date of expiration, the State of California was faced with a judgment of its own Supreme Court in *Coan* v. *State of California, supra,* 11 Cal. 3d 286, 520 P.2d 1003 (1974), ordering payment of the salaries in question. The Supreme Court's mandate, effective May 19, 1974, would have placed California officials in contempt but for the injunction which petitioner obtained in the District Court on May 17, 1974. Upon a review of the record, the Temporary Emergency Court of Appeals has concluded that the Government has expressly conceded that California did *not* make any "threats" of paying the sums in question prior to expiration of the Act. See 504 F.2d at 756.

Petitioner contends that the General Saving Statute, 1 U.S.C. § 109, applies to California notwithstanding the limited jurisdiction of the Cost of Living Council under section 218 of the Act. The Temporary Emergency Court of Appeals has treated the application of the General Saving Statute (1 U.S.C. § 109) to post-expiration enforcement proceedings and has concluded that, like section 218 of the Act, such statute permits enforcement proceedings, after expiration, only as to violations of the Act occurring before expiration. 504 F.2d at 754. In so holding, the Court relied on a decision of this Court in *Allen* v. *Grand Central Aircraft Co., supra,* 347 U.S. 535 (1953), wherein the Court specifically held that 1 U.S.C. § 109 only permits actions "to *enforce* the expired statute in relation to *violations* of it, or of the regulations issued under it, *occurring before its expiration.*" (Emphasis added.) *Ibid.,* 347 U.S. at 554-555. Clearly, then, even the general saving statute does not permit continuing jurisdiction of the Council where there exists, as here, no violation which existed prior to expiration.[14]

[14] In its Petition for Rehearing and Suggestion for Rehearing *En Banc,* presented to the entire nine-member court below, petitioner raised a battery of five additional cases, three of which, without exception, negated petitioner's argument and uniformly held that the General Saving Clause (1 U.S.C. § 109) preserved jurisdiction only where there existed the commission of a violation *before* the expiration of controls. *Eastern Coal Co.* v. *N.L.R.B.,* 176 F.2d 131 (4th Cir. 1949); *N.L.R.B.* v. *National Garment Co.,* 166 F.2d 233, 237 (8th Cir. 1948); *N.L.R.B.* v. *Edw. G. Budd Mfg.,* 169 F.2d 571, 575 (6th Cir. 1948). The two remaining cases are easily distinguished for in one (*Herman* v. *Woods,* 175 F.2d 781 [Em.App. 1949]) juris-

IV. Section 218 of the Act, as Properly Construed by the Temporary Emergency Court of Appeals, Reflects a Clear Intent by Congress to Return to a Free Market

Upon the expiration of economic controls on April 30, 1974, President Nixon issued Executive Order No. 11781 and, in an accompanying statement, said to the Nation:

> "Mandatory wage and price controls of the last three years have served a useful function, especially in their early stages, but increasingly they have become obstacles to the effective performance of the economy. We have therefore been reducing the coverage of direct controls, gradually at first and rapidly in the last few months. Our continu-

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diction was predicated on a *pre-expiration* violation, and in the other (*Hertz* v. *Woodman*, 218 U.S. 205 [1910]) legacies received under the War Revenue Act, a "liability" under the Act while effective, were subject to continuing tax liability after expiration. Neither a pre-expiration violation, nor civil or criminal liability, are present here.

In order for the general saving clause (1 U.S.C. § 109) to apply, other courts in a variety of circumstances have uniformly required the operative act or "violation" to have occurred *during the statute's effectiveness.* See, *e.g.*, *United States* v. *Carter*, 171 F.2d 530, 532 (5th Cir. 1948); *Professional and Business Men's Life Ins. Co.* v. *Bankers Life*, 163 F.Supp. 274, 295 (Mont. 1958); *Bowen* v. *United States*, 171 F.2d 533, 534 (5th Cir. 1949); *Maceri* v. *United States*, 342 F.Supp. 505, 506 (E.D. Mich. 1972); *Faubion* v. *United States*, 424 F.2d 437, 438-439 (10th Cir. 1970); *Peters* v. *Felber*, 66 Cal.App. 2d Supp. 1011 (1944); *United States* v. *Smalldone*, 485 F.2d 1333, 1344 (10th Cir. 1973); *Sullivan* v. *Day*, 372 F.Supp. 359, 360 (E.D. Ky. 1974). An interesting case which will resolve a conflict among the circuits as to the application of 1 U.S.C. § 109 to the mandatory penalties for narcotic offenders under 26 U.S.C. § 7237(d), in light of newly enacted eligibility for parole under 18 U.S.C. § 4204, is presented in *Warden, Lewisburg Penitentiary* v. *Marrero*, cert. granted 414 U.S. 1128 (1974), USSC No. 73-831.

ing goal is to liberate the entire economy so that it will grow and adapt free of controls or the threat of controls."

President Ford, assuming office a short time later, stated on August 28, 1974, in a nationally televised press conference:

"Controls are out, period."

Secretary of the Treasury William Simon [15], attending the California Conference on Inflation with California Governor Ronald Reagan, stated on Wednesday, October 23, 1974:

"America has more government than most people want, and we most certainly have more government than we're willing to pay for. . . . freedom is not only precious for the American people, it's also efficient, and it's proven to be the most efficient thing in this free enterprise system that has given the American people the greatest prosperity that the world has ever known. And let us not forget that, because *if we go back to controls one more time, God help us. I lived through the closing phase of the last one—the inefficiencies,*

[15] By Section 2 of Executive Order No. 11788 (June 20, 1974), the orderly termination of economic controls have been delegated to the Secretary of the Treasury. There is no longer a "Cost of Living Council" but rather a Council on Wage and Price Stability which merely has the authority to monitor wages and salaries, not to limit them. Pub. L. 93-387, 88 Stats. 750.

the distortions, the inequities, and the ultimate inflation that follows at the end. You're postponing it. Controls are nothing but a copout." (Emphasis added.)

The leaders of the national administration have thus agreed, publicly at least, that a bureaucracy, such as the Cost of Living Council, is no match for the free market in the allocation of human and material resources for the common good.[16]

CONCLUSION

Thirty years of judicial precedent supports the Court's decision relative to the expiration clause, and its exceptions, contained in section 218 of the Eco-

[16] The primary thrust of the Petition is nevertheless addressed to the contention that the decision in issue will "add substantially to current inflationary pressures", will "encourage others to challenge the many limitations on wage increases that the Council imposed", and will "merely defer the effects of inflationary sums" earned during the existence of the Economic Stabilization Act of 1970 (Petition, pages 7–10). These fears conjured by petitioner were considered by Congress when it failed to renew the Act, leaving the economy free of federal intervention, and leaving to the judiciary a clear intent that the Council's "*authority to issue and enforce* orders and regulations expires at midnight April 30, 1974. . . ." That prerogative of Congress should not be disturbed, irrespective of what petitioner may deem from a standpoint of economic policy to be inexpedient or unwise. *Maryland* v. *Wirtz*, 392 U.S. 183, 194, fn. 22 (1967).

nomic Stabilization Act of 1970. Thus, petitioner has abandoned its former reliance on such precedent and now urges an antiseptic analysis of section 218 without regard to prior control acts. The argument must fail.

The facts are undisputed. California has not violated, by "escrow" or otherwise, the Council's August 1973 Decision and Order. Petitioner United States has to this point freely admitted to such compliance. In the absence of a pre-expiration violation, by operation of law the District Court was without subject matter jurisdiction to issue a preliminary injunction against the State of California.

This Honorable Court can, with one stroke, implement the intent of Congress and honor the clear and consistent decisions of this Court and former Emergency Courts of Appeal set out here and in the opinion below.

The Court should Order that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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